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PERWIRA HABIB BANK (M) BHD.

v.

HONG HUAT HOLDINGS SDN. BHD. & ORS.

*b*SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
EUSOFF CHIN SCJ
[CIVIL APPEAL NO. 02-363 OF 1989]
27 APRIL 1992*c*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, appeal against refusal to set aside - Whether High Court pending disposal of subsequent action by respondents should grant interlocutory injunction of summary judgment decreed by another High Court of concurrent jurisdiction - Inherent jurisdiction of Court to grant interlocutory injunction - Propriety of application - Whether discretion exercised judicially according to law on established principle.*

d

The issue in this appeal was whether the High Court should pending the disposal of a subsequent action, grant an interlocutory injunction to stay execution of a summary judgment decreed by another High Court of concurrent jurisdiction after the judgment has been upheld by the Supreme Court.

e

The appeal was against the order of Anuar J made in chambers on 11 September 1989 dismissing the appellant's application to set aside an *ex parte* interlocutory injunction which His Lordship had granted to the respondents on 20 July 1989 restraining the appellant bank from levying any execution proceeding of a final judgment of another High Court decreed by Harun J (as His Lordship then was) on 18 April 1988 *vide* Kuala Lumpur High Court Civil Suit No. C23-2831-86 and upheld on appeal by the Supreme Court on 31 May 1989 *vide* Supreme Court Civil Appeal No. 249 of 1988.

*f***Held:**

[1] To entitle the respondents to apply for a stay of execution of the summary judgment under O. 14 r. 3(2) of the RHC 1980, it is not necessary that a defence with a counter-claim has been filed. It is sufficient that the counter-claim has been raised in the affidavit in opposition to the O. 14 application which is clear from O. 14 r. 3(2) itself.

g

[2] Although an interlocutory injunction is a discretionary relief vested in the Judge of the High Court, and the function of an appellate Court is not to exercise an independent discretion on its own, a failure to consider statutory provisions and a failure to consider balance of convenience entitles the appellate Court to re-hear the whole application, since the granting of it was wrong in law and therefore not an exercise of the judicial discretion.

h

[3] In the absence of a written judgment or grounds of judgment, the Supreme Court was entitled to hold from the notes of evidence that the learned Judge was in error when he seems to conclude that just because s. 14 of the Specific Relief Act 1950 only applied to perpetual injunction, he was compelled to grant the interlocutory injunction without directing his mind to the interplay between the provisions of the Courts of Judicature Act 1964, the High Court Rules 1980 and the Specific Relief Act 1950 and by giving mere lip service to the principle of granting interlocutory injunction as laid down in the *American Cyanamid* case.

i

[4] The respondents have waived their rights to stay the summary judgment pending the disposal of the present action even if the respondents' action against the appellant could be construed as a counter-claim to the appellant's action against the respondents.

a

[5] The discretion ought not to be exercised in favour of the respondents by granting them a stay at this late stage by means of interlocutory injunction. To allow them to do so in the present circumstances, would tantamount to permitting the respondents to abuse the process of the Court, and would unreasonably prejudice the appellants from enjoying the fruit of their final judgment.

b

[Appeal allowed with costs. Deposit refunded to appellant.]

[Bahasa Malaysia Translation of Headnote]

PROSEDUR SIVIL: *Injunksi - Injunksi interlocutori, rayuan terhadap keengganan untuk mengetepikan - Samada Mahkamah Tinggi sementara menunggu penyelesaian tindakan selanjutnya harus membenarkan injunksi interlocutori terhadap penghakiman terus yang didekri oleh Mahkamah Tinggi yang lain tetapi berbidangkuasa sama - Kuasa-kuasa sedia ada Mahkamah untuk membenarkan injunksi interlocutori - Kewajaran permohonan - Samada budibicara telah dipertimbangkan secara tindakan kehakiman yang patut menurut undang-undang dan prinsip-prinsip yang kukuh.*

c

d

Isu dalam rayuan ini adalah samada Mahkamah Tinggi sementara menunggu penyelesaian tindakan selanjutnya, dengan sewajarnya, membenarkan satu injunksi interlocutori untuk menangguhkan pelaksanaan penghakiman terus yang diberikan oleh Mahkamah Tinggi yang lain yang mempunyai bidangkuasa yang sama dengannya setelah keputusan penghakiman telah disahkan oleh Mahkamah Agung.

e

Diputuskan:

[1] Untuk membolehkan responden membuat permohonan untuk penggantungan pelaksanaan penghakiman terus dibawah Aturan 14 Kaedah 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980; tidak semestinya pembelaan dengan tuntutan balas difailkan terlebih dahulu. Memadailah sekiranya tuntutan balas telah diujahkan dalam affidavit sebagai tindakan menentang permohonan bawah Aturan 14; ini sememangnya jelas ternyata dalam Aturan 14 Kaedah 3(2).

f

[2] Walaupun relief injunksi interlocutori ini mengikut budibicara Hakim Mahkamah Tinggi dan fungsi Mahkamah Rayuan bukanlah untuk menggunakan budibicaranya yang dimilikinya sendiri, kegagalan mempertimbangkan peruntukan-peruntukan statut dan kegagalan mempertimbangkan imbalan kesenangan (balance of convenience) memberikan kuasa kepada Mahkamah Rayuan untuk membicarakan semula seluruh permohonan tersebut oleh kerana perintah membenarkan injunksi itu adalah salah di sisi undang-undang dan oleh yang demikian bukan semata-matanya hanya satu penggunaan budibicara kehakiman.

g

[3] Oleh sebab tidak wujudnya keputusan bertulis ataupun alasan-alasan keputusan, Mahkamah Agung berhak memutuskan dari pemerhatian nota-nota keterangan bahawa Hakim Yang Arif telah tersilap apabila beliau telah membuat kesimpulan iaitu oleh sebab s. 14 Akta Relief Tertentu 1950 hanya dipakai untuk injunksi berkekalan, dia terpaksa pula membenarkan injunksi interlocutori tanpa mempertimbangkan soal kaitan antara peruntukan-peruntukan Akta Mahkamah Kehakiman 1964, Kaedah-Kaedah Mahkamah Tinggi 1980 dan Akta Relief Tertentu 1950 dan memberikan hanya "lip service" kepada prinsip membenarkan permohonan injunksi interlocutori seperti yang tercatat dalam kes *American Cyanamid*.

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i

a [4] Pihak responden telah mengenepikan hak-hak mereka untuk menggantungkan penghakiman terus sementara menunggu penyelesaian tindakan masa kini dan walau sekiranya tindakan responden terhadap perayu dianggap sebagai tuntutan tindakbalas terhadap tindakan perayu menentang responden.

b [5] Budibicara tidak sepatutnya digunakan memihak responden dengan membenarkan penggantungan pada peringkat lewat ini melalui kaedah injunksi interlocutori. Jika ia dibenarkan, ini seakan-akan membenarkan responden melakukan penyalahgunaan proses Mahkamah dan secara tidak munasabah memudaratkan perayu daripada menikmati hasil keputusan muktamad.

Cases referred to:

- c** *Sheppards & Co. v. Wilkinson & Jarvis* [1889] 6 TLR 13 (**fol**)
Lee Guat Eng v. Seet Tiam Hock [1974] 1 MLJ 178 (**cit**)
Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 (**cit**)
P.H. Grace Pte. Ltd. & Ors. v. American Express International Banking Corp. [1987] 1 MLJ 437 (**cit**)
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 (**fol**)
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (**cit**)
Bina Satu Sdn. Bhd. v. Tan Construction [1988] 1 MLJ 533; [1988] 2 CLJ 652 (**cit**)
d *Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independant Schools, West Malaysia* [1988] 1 MLJ 302 (**cons**)

Legislation referred to:

- e** Companies Act 1965, ss. 217, 218
 Courts of Judicature Act 1964, ss. 23(2), 73
 Rules of the High Court 1980, O. 14, r. 3(2), O. 47 r. 1
 Specific Relief Act 1950, s. 54(a), (b), (d), (i)

Other source referred to:

Mallal's Supreme Court Practice, p. 573
 For the appellant - D.P. Naban; M/s. Skrine & Co.
 For the respondent - K.S. Narayanan; M/s K.S. Narayanan Associates

f **JUDGMENT**

Mohd. Azmi SCJ:

g This appeal raises an interesting question of law as to whether the High Court should pending the disposal of a subsequent action, grant an interlocutory injunction to stay execution of a summary judgment decreed by another High Court of concurrent jurisdiction after the judgment has been upheld by the Supreme Court. Mr. Naban for the appellant bank says that there is no such power and in any event it should not be granted, whilst Mr. Narayanan for the respondents argues otherwise by contending that the prohibition imposed against issuing of injunction under s. 54(a) and (b) Specific Relief Act 1950 is applicable only to perpetual injunction but not to interlocutory injunction.

h In the present case, the appeal is against the order of Anuar J made in chambers on 11 September 1989 dismissing the appellant's application to set aside an *ex parte* interlocutory injunction which His Lordship had granted to the plaintiffs (respondents before us) on 20 July 1989 restraining the appellant bank from levying any execution proceeding of a final judgment of another High Court decreed by Harun J (as he then was) on 13 April 1988 *vide* Kuala Lumpur High Court Civil Suit No. C23-2831-86 and upheld on appeal by the Supreme Court on 31 May 1989 *vide* Supreme Court Civil Appeal No. 249 of 1988, (hereinafter referred to as "the 1986 action").

i

In that 1986 action, the present appellant was granted a summary judgment for the sum of RM13.9 million against the present respondents under O. 14 RHC 1980. The judgment was obtained in respect of repayment of a bridging loan given by the appellant to the respondents to finance their housing projects which had long been abandoned. It is common ground that in the proceedings before Harun J, the O. 14 application was properly made before the respondents had filed a defence. In fact a defence was never filed even on the day when the summary judgment was entered in favour of the bank. But in their affidavit in opposition to the O. 14 proceeding, they did raise matters which Harun J held could not constitute a defence but could constitute a separate cause of action. This finding was not challenged on appeal when the O. 14 judgment was upheld by the Supreme Court. On the contrary, relying apparently on this very finding, the present action against the appellant bank was filed by the respondents as a separate suit on 19 July 1989 *vide* Kuala Lumpur High Court Civil Suit No. D1-22-1541-89 (hereinafter referred to as the “present action”). It is also alleged that at the conclusion of the O. 14 proceeding in the 1986 action, the respondents never applied for a stay of execution of the summary judgment either in the High Court or the Supreme Court pending the filing of the present action.

Order 14 r. 3(2) RHC 1980 provides:

The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counter-claim **made or raised** by the defendant in the action. (Emphasis supplied)

Further, in *Sheppards & Co. v. Wilkinson & Jarvis* [1889] 6 TLR 13, Lord Esher, MR laid down the principle as to whether under O. 14 application where a counter-claim has been raised by the defendant, a summary judgment should notwithstanding the counter-claim, be given to plaintiff and if such judgment be given whether execution thereon should be stayed. This matter was also discussed in *Lee Guat Eng v. Seet Tiam Hock* [1974] 1 MLJ 178 and in *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267, and also in the Singapore case of *P.H. Grace Pte Ltd. & Ors. v. American Express International Banking Corpn.* [1987] 1 MLJ 437 at 438. For the purpose of this appeal it is sufficient to summarise that these authorities provide that a summary judgment can be granted notwithstanding the fact that a counter-claim has been made or raised.

The power of the High Court to grant a stay of execution is conferred by O. 47 r. (1) RHC 1980 on special circumstances. (see *Mallal's Supreme Court Practice* p. 573). In an O. 14 proceeding, an application for stay of execution may be made by a defendant without the issue of a separate summons at the time summary judgment was given against him. Further s. 73 of the Courts of Judicature Act 1964 provides:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Supreme Court may direct.

In this appeal we are satisfied on the evidence that a stay of execution was never applied for in the 1986 action. Consequently, no stay of execution proceeding was granted either by the High Court or the Supreme Court because everybody apparently agreed that the matters raised in the respondents’ affidavit in opposition before Harun J (as he then was) could not constitute a defence but should be treated as a separate action against the appellant bank. But what was overlooked by the respondents was that since they held the view that the matters raised could constitute or was in substance a counter-claim, the respondent had the opportunity to apply for a stay of execution of the summary judgment under O. 14 r. 3(2) RHC. By electing not to do so, the respondents must be taken to have waived their rights

a to a stay of proceeding of the 1986 action, and they are therefore estopped from now arguing that the present action is in fact or in substance a counter-claim raised in the 1986 action entitling them to a stay. Consequently, we are of the opinion that the argument of Mr. Narayanan that there was a counter-claim in the 1986 action or that the present action in this appeal should be treated as a counter-claim, is irrelevant and of no consequence.

b It should be observed that to entitle the respondents to apply for a stay of execution of the summary judgment under O. 14 r. 3(2), it is not necessary that a defence with a counter-claim has been filed. It is sufficient that the counter-claim has been raised in the affidavit in opposition to the O. 14 application. In our view, this is clear from O. 14 r. 3(2) itself. Mr. Narayanan has brought to our attention that the alleged counter-claim has in fact been raised in the respondents' affidavit. That being so, his argument on the fact that no defence had been filed during the O. 14 proceeding is no excuse for not applying for a stay in the High Court or the Supreme Court. As alluded to earlier, the respondents have waived their rights to stay the summary judgment pending the disposal of the present action even if the present action could be construed as a counter-claim to the 1986 action, and as such the discretion ought not to be exercised in their favour by granting them a stay at this late stage by means of interlocutory injunction. To allow them to do so in the present circumstances, would in our opinion tantamount to permitting the respondents to abuse the process of the Court, and would unreasonably prejudice the appellants from enjoying the fruit of their final judgment. It is true that the respondents have now obtained a judgment against the appellant bank in the present action which the Supreme Court has remitted to the lower Court for assessment of damages. However, the appellant is in the business of banking, and, we cannot accept the argument that the respondents could not be restored to their original position should the damages assessed against the appellant exceed RM13.9 million. In any event the fear of the first respondent from being wound up should the appellant bank file a petition against them under s. 217 of the Companies Act 1965, should not tilt the balance of convenience in their favour, as it is for them to oppose such petition and convince the High Court at the appropriate time that they would be entitled to a judgment of more than RM13.9 million and are able to pay their debts under s. 218 of the Act.

f The learned Judge in dismissing the appellant's application to set aside the *ex parte* order of interim injunction gave the following cryptic reasons at p. 38 of the notes of evidence:

- (i) Jurisdiction - s. 54 only applies to perpetual injunction -
- (ii) This is only an application in the nature of stay of execution.
- (iii) O.14 - applicable.

g Although he did mention balance of convenience at p. 39, it is not clear how he came to the conclusion that the balance is in favour of the respondents. Nor did he identify the serious issues to be tried. We have sufficiently dealt with the second and third points to show that the failure to apply for stay in the 1986 action is fatal, and for reasons already discussed, the learned Judge erred in law to grant a stay of execution of the O. 14 judgment by a back door method after the right has been waived.

h

This would leave for our consideration only the first point under s. 54, Specific Relief Act 1950 (Revised 1974). We would reproduce paras. (a), (b) and (i) of the section:

54. An injunction cannot be granted:

- i** (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

- (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

We do not really understand how a provision prohibiting the grant of perpetual injunction under s. 54 of the Specific Relief Act can confer jurisdiction to the High Court to an extent that it can override the provisions of the High Court Rules and the Courts of Judicature Act in the matter of stay of execution especially relating to a final order of the Supreme Court. Mr. Narayanan has referred to us two authorities which he attributes as the pillars of his argument. The first case is *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, where on a preliminary objection by the defendant, it was held that the prohibition imposed by s. 54(d) of the Specific Relief Act 1950 applied only to application for perpetual injunction but had no relevance to temporary injunction sought by the plaintiff to restrain the defendant from demolishing the plaintiff's premises. The next case cited is *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 MLJ 533 where in overruling a preliminary objection raised by Tan Construction against Bina Satu application to restrain them from petitioning to wind up the company, V.C. George J held that s. 54(b) of the Act should be read as having reference to only perpetual injunction, and that s. 54(b) relates to injunctions imposed on other Courts and not to injunctions imposed on the parties to the litigation. There, the fundamental issue for determination was whether s. 54(b) had the effect of excluding or watering down the Court's inherent jurisdiction preserved by s. 23(2) of the Courts of Judicature Act 1964 to grant an order restraining the abuse of the Court's process. It should be noted that both the High Court authorities cited dealt with preliminary objections before the merits of the applications for interlocutory injunction were considered. In the circumstances we agree with Mr. Naban that the s. 54 argument is a red herring and that the authorities cited do not assist the respondents. In this appeal the existence of the power of the High Court to grant interlocutory injunction does not appear to be in doubt. It is only the propriety of its application according to established principles which is in issue.

In our view, irrespective of whether an interim injunction is sought on the basis of statutory provisions or on the inherent jurisdiction of the Court to restrain abuse of its process, it must be exercised judicially according to law on established principle of granting injunction as enunciated in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 which has been consistently applied by the Courts in this country.

Although an interlocutory injunction is a discretionary relief vested in the Judge of the High Court, and the function of an appellate Court is not to exercise an independent discretion on its own, failure to consider statutory provisions and failure to consider balance of convenience entitles this Court to re-hear the whole application, since the granting of it was wrong in law and therefore not an exercise of the judicial discretion (see *Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 SC). In the absence of a written judgment or grounds of judgment, we are entitled to hold from the notes of evidence that the learned Judge is in error when he seems to conclude that just because s. 54 only applies to perpetual injunction, he is compelled to grant the interlocutory injunction without directing his mind to the interplay between the provisions of the Court of Judicature Act, the High Court Rules and the Specific Relief Act, and by giving mere lip service to the principle of granting interlocutory injunction as laid down in the *American Cyanamid* case. When asked to do so, Mr. Narayanan was unable to assist us on the question of whether the general power of the High Court to stay execution of O. 14 judgment by interim injunction under the Specific Relief Act could override the

- a* specific provisions for stay of such judgment in the Courts of Judicature Act read with the High Court Rules. Be that as it may, we are of the view that on the facts and circumstances of this particular case, the interlocutory injunction cannot be sustained in view of the failure of the learned Judge to consider the relevant statutory provisions governing stay of execution of summary judgment where a counter-claim has been made or raised, quite apart from his failure to consider critically not only the issue of balance of convenience but also to consider
- b* what serious questions need possibly be tried in the pending action particularly now when all that is left for determination is the assessment of damages. In the event, the granting and continuing of the interlocutory injunction cannot be said to be an exercise of judicial discretion by the learned Judge, and the appellant's application to discharge the injunction ought therefore to be allowed.
- c* For the above reasons, the appeal is allowed with costs, and the deposit is refunded to the appellant.

Also found at [1992] 3 CLJ 1525

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